NO. 36988-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE WELFARE OF M.G.M.

STATE OF WASHINGTON,
Respondent,

v.

C.R.
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan K. Serko, Judge

BRIEF OF APPELLANT

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1. The trial court erred in entering Findings of Fact VIII, X, XIII, and XIV. CP 12-14.

2. The court erred in concluding that the state proved the allegations in RCW 13.34.180(1) (e) and (f) by clear, cogent, and convincing evidence.

3. The court erred in terminating appellant's parental rights.

Issues pertaining to assignments of error

1. Where appellant participated in ordered services, including individual counseling to address relationship issues, and appellant's counselor testified that appellant had made progress in this area and shown insight into the fact that her prior relationships had been unhealthy, did the court err in finding appellant had failed to make progress and thus there was little likelihood the child could be returned in the near future?

2. Where the evidence showed that the child was integrated into a home with her paternal aunt, who planned to adopt her if termination were granted, and there was no evidence that continuing the dependency for a short time while appellant resolved her financial and legal situation would interfere with that integration, did the court erroneously order termination of appellant's parental rights?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant C.R. is the mother of M.G.M., born January 9, 2006. CP 1, 11-12. Her father is M.M. CP 1. M.G.M. was found dependent on March 27, 2006, and the Department of Social and Health Services filed a petition to terminate the parent-child relationship on October 26, 2006. CP 1-4. The case proceeded to a fact finding hearing in Pierce County Superior Court before the Honorable Susan K. Serko. M.M. signed a voluntary relinquishment of parental rights, and the court entered findings of facts, conclusions of law, and orders terminating the parental rights of M.M. and C.R. CP 9-10, 11-17, 18-20, 21-23. C.R. filed this timely appeal. CP 26.

2. Substantive Facts

When M.G.M. was born, C.R. tested positive for methamphetamine. 2RP[1] 73. C.R. admitted taking a couple of puffs off a pipe two days before she gave birth, and she acknowledged at the termination hearing that she put her daughter at risk by doing so. 2RP 73, 100-01. M.G.M. was taken into custody from the hospital and placed with her paternal grandmother. 2RP 132; 3RP 209. Within a couple of months,

[1] The Verbatim Report of Proceedings is contained in four consecutively-paginated volumes, designated as follows: 1RP—10/11/07; 2RP—10/16/07; 3RP—10/17/07; 4RP—10/18/07.

she was moved to the home of her paternal aunt, where she has lived since that time. 3RP 208.

C.R. began participating in services. She was ordered to do random UAs, a drug and alcohol assessment, parenting classes, individual counseling, and visitation. 2RP 143. Over the course of the dependency, C.R. did 49 UAs and missed 10. 2RP 134-35, 136; 3RP 312. None of the UAs she did was positive for controlled substances, although by policy the department considered her missed UAs to be positive. 2RP 135; 3RP 312-13.

In addition, C.R. completed a drug and alcohol assessment and participated in treatment at Rainier Counseling in Enumclaw. 2RP 135. She was in financial noncompliance with treatment at times, and therefore unable to attend, but she continued to make progress. 2RP 136; 331-32, 334. Neither her treatment counselor nor her psychotherapist ever had any reason to suspect C.R. was using methamphetamine. 3RP 245-47, 265-66, 329, 331, 334. C.R. testified that she has not used methamphetamine since M.G.M. was born. 3RP 340.

C.R. has two older sons who currently live with her mother in Buckley, in a third-party custody placement. 2RP 48, 69. C.R. lives in Buckley also, so that she can see her sons everyday. 2RP 71. Most of the services offered by the department have been in Tacoma, however, and

finding transportation has been a challenge throughout the dependency. 2RP 88, 101, 136; 3RP 342-43. The difficulty of getting to Tacoma for services was one of the reasons C.R. chose to do her treatment at Rainier Counseling, even though there was no financial assistance available for that program. 2RP 101-02. She also chose not to look for housing closer to Tacoma, so that she could continue to spend time with her sons. 2RP 71; 3RP 254, 294, 313.

The department was also concerned about C.R.'s history of relationships with inappropriate men. Her oldest son's father was violent, and she did not have a prolonged relationship with him. 2RP 50. C.R. was with her younger son's father, Todd Shaffer, off and on for five years. 2RP 51. They smoked marijuana together, and he was in and out of jail. 2RP 51, 53. Shaffer lived with C.R.'s mother after he was released from prison in 2002, even though he and C.R. were no longer romantically involved. 2RP 57. In 2003, C.R. pleaded guilty to conspiracy to possess pseudoephedrine with intent to manufacture methamphetamine, as a result of items found in her then boyfriend's house, and she participated in the Breaking the Cycle program as part of her sentence. 2RP 57-60. Another boyfriend was physically abusive when C.R. ended her relationship with him. 2RP 66. C.R. started living with M.M. in 2005. Although he had a

history of manufacturing methamphetamine, he did not use drugs while they were together. 2RP 72.

The social worker testified that she had talked to C.R. about finding gainful employment so that she would not be dependent on M.M. for support. 3RP 277-78. She referred C.R. to Work First for employment assistance, but C.R. learned that she would only qualify for that assistance if her children were living with her. 3RP 278, 344. C.R. did odd jobs throughout the dependency, and she testified at the hearing that she had just secured employment with Maid-to-Clean. 2RP 89, 102; 3RP 202, 226, 314. She was also working on obtaining her GED, although that process was taking longer than she anticipated, and she expressed a desire for help. 2RP 90; 3RP 218, 250, 346.

Following a parenting assessment in February 2007, C.R. was referred for individual counseling for help dealing with relationship issues and making changes to prove she could be stable and regain custody of M.G.M. 3RP 213, 277. She began seeing psychotherapist Roxanne Brown on May 4, 2007. 3RP 212, 297. Over the course of her work with C.R., Brown felt C.R. had shown insight into the fact that she had chosen to be with inappropriate men in the past and was realistically working to break that pattern. 3RP 218-19, 240. Brown believed that C.R. had made

appropriate progress toward making wiser choices and forming healthier relationships. 3RP 213, 234, 239-40.

While C.R. complied with the dependency orders by engaging in services, M.M. did not. 3RP 274. He did one initial UA but disregarded the social worker's attempts to engage him in further services. 3RP 274. The social worker explained to C.R. that it would be difficult to reunite her with M.G.M. if she was living with someone who did not demonstrate to the department that he was clean and sober. 3RP 276. C.R. was concerned about M.M.'s lack of participation in services, and she spoke to him about it several times. 2RP 75.

In May or June 2007, C.R. asked M.M. to move out of the residence they shared. 2RP 76. C.R. felt M.M. had the potential to be a good father because he has a big heart, but he was not taking that responsibility seriously enough, and she ended her relationship with him. 2RP 76, 79. Although C.R. has spoken with M.M. since that time, she no longer depends on him for support. 2RP 78-79. This change came as a result of the progress she was making in counseling. C.R. learned that her prior relationships with men were not healthy for raising a child, and she acknowledged that those relationships were inappropriate. 2RP 109, 113.

In August, 2007, after M.M. had moved out, the social worker and CASA visited C.R. at her home. The social worker testified that the home

was a disaster, very unclean and inappropriate for a child. 2RP 145, 147. She was concerned that C.R. asked her not to go into the master bedroom, saying there had been a fire in that room and the smell would make her sick. The room C.R. referred to as M.G.M.'s was only a few feet from the master bedroom. 2RP 146. C.R. was apologetic about the mess and explained that she was being evicted. 2RP 147. At the termination hearing, C.R. explained that she had learned in January that she would be evicted, and she stopped maintaining the property at that time. 3RP 349. She agreed that it was inappropriate for a child, but she had no intention of bringing M.G.M. into that home and had never asked for visits or placement of M.G.M. there. 3RP 257, 312, 346.

C.R. was physically evicted from the property on September 6, 2007, although she had stopped staying at the property for the most part a few weeks earlier when the water was shut off. 2RP 82. During the eviction, workers hired to move property out of the trailer called the police when they found items that appeared to be related to a methamphetamine lab. 2RP 119. The police processed the scene, taking photographs and collecting evidence. 2RP 154-69.

M.M. was at the property when police arrived, and he was arrested. Items related to methamphetamine production and use were found both in the trailer and in M.M.'s car. 2RP 120, 178. C.R. arrived as the property

was being searched, and she told officers that she knew nothing about the methamphetamine lab. 2RP 122-23. C.R. was charged with manufacturing methamphetamine, and the charge was still pending at the time of the termination hearing. 2RP 87.

C.R. moved in with Dave Wiley around the time of the eviction. 2RP 80-82. He owns the home they live in. 2RP 85. When she spoke to the social worker on August 31, 2007, C.R. said that Wiley was very excited to have her move in with him. 2RP 147-48. C.R. reported to her therapist that Wiley was different from men she had been in relationships with previously, as he was responsible and had no trouble with the law, and she testified that her relationship with Wiley was healthier than her previous relationships. 2RP 110; 3RP 232. C.R. testified that Wiley is a cabinetmaker, although he recently took a vacation and had not yet returned to work. 2RP 96. The social worker testified that when she met Wiley at a court hearing, he said he was currently laid off from his job. 3RP 202.

C.R.'s visits with M.G.M. have been positive throughout the dependency, and the court ordered the department to increase visitation in June 2007. 2RP 137. The visits always go very well, and C.R has a great bond with her daughter. 3RP 207. C.R. is very attentive to M.G.M. 3RP

287. They sing and play together, and there is positive interaction between them. 2RP 138.

The social worker testified that she was never concerned about the quality of visits, but she did not believe that the visits indicated C.R. could successfully parent M.G.M., and she recommended termination. 3RP 208-09. The social worker testified that M.G.M. deserves to be legally free to be adopted into the wonderful family with whom she currently lives. 3RP 208. The CASA agreed with this recommendation, saying that M.G.M. is extremely bonded with her aunt, and it would be in M.G.M.'s best interests to remain in that placement. 3RP 375.

C.R. testified that she was capable of parenting M.G.M., even though she was not currently living independently, and the house she lived in was appropriate for M.G.M. 3RP 348. She also felt she would be able to achieve independence and stability within near future. 3RP 347.

The court terminated C.R's parental rights. It entered written findings of fact, including the following:

> VIII.
>
> During the course of this dependency [C.R.] was only partially compliant in services. While she participated in counseling and parenting classes, she only intermittently participated in substance abuse treatment and random urinalysis testing. Of the forty-nine urinalysis tests [C.R.] was required to take, she took only thirty-nine. This is not substantial compliance. [C.R.] participated in drug and alcohol treatment with a private

provider, but she did not complete treatment. This places [C.R.] ongoing sobriety into question.

…

X.

There is little likelihood that conditions will be remedied so that [M.G.M.] can be returned to [C.R.] in the near future. [C.R.] has not made significant progress in correcting her parental deficiencies during the course of this dependency. Despite the child's father's continued lack of participation in the dependency, [C.R.] continued to reside with him until recently. The father, [M.M.], presents a danger to the child's health, safety and welfare. Despite services designed to address this issue, [C.R.] failed to demonstrate an understanding of the impact of her poor choices in relationships on the safety and welfare of her child.

…

[C.R.] failed to substantially improve her parental deficiencies within twelve months following entry of the dispositional order. Those parental deficiencies include, but are not limited to: poor decision making skills; failure to provide a safe and stable home; failure [to] practically apply any demonstrated parenting skills; and failure to extradite herself from a substance abuse lifestyle.

…

XIII.

Continuance of the parent-child relationship clearly diminishes the child's prospects for integration into a stable and permanent home. The child is currently placed wit her paternal aunt, [L.B.]; a pre-adoptive resource. As there is little likelihood that the child will be returned to [C.R.] in the foreseeable future, so long as [C.R.] retains her parental rights, the child will not be able to be integrated into a stable and permanent home through adoption.

XIV.

> An order terminating all parental rights is in the best interests of [M.G.M.]. The child is currently placed with the paternal aunt, which is an appropriate pre-adoptive placement for this child. [C.R.] [sic] This child deserves permanency; the most assured road to permanent [sic] is through adoption by the present placement.

CP 12-14.

C. ARGUMENT

THE STATE FAILED TO PROVE THE STATUTORY REQUIREMENTS FOR TERMINATION.

Parental rights are a fundamental liberty interest protected by the Constitution. Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982). Our courts have recognized that "Parents have a fundamental liberty and privacy interest in the care and custody of their children. Permanent deprivation of parental rights should be allowed only for the most powerful reasons." Welfare of A.J.R., 78 Wn. App. 222, 229, 896 P.2d 1298, review denied, 127 Wn.2d 1025 (1995) (citations omitted).

Thus the state may disturb the family unit only to protect a child's right to conditions of minimal nurture, health and safety. RCW 26.44.010; In re Frederiksen, 25 Wn. App. 726, 734, 610 P.2d 371 (1979), review denied, 94 Wn.2d 1002 (1980). "Our courts have emphatically repudiated the concept that all children are wards of the State and that the State and its agencies have an unhampered right to determine what is best for a child." In re May, 14 Wn. App. 765, 766, 545 P.2d 25, review denied, 87

Wn.2d 1006 (1976). The state may not disrupt and destroy the family unit simply because the child might have a better home with someone else. Rather, the court must determine whether the parent's conduct has been such that he or she has abdicated or forfeited parental rights by that conduct. In re May, 14 Wn. App. at 768 (citation omitted). "The child also has an interest in preventing the erroneous deprivation of its relationship with its natural parents" in addition to the parents' liberty interest. In Re Dependency of C.R.B., 62 Wn. App. 608, 615, 814 P.2d 1197 (1991); Santosky v. Kramer, 455 U.S. at 765 ("the parents and the child share an interest in avoiding erroneous termination").

The procedures set forth in RCW 13.34 reflect a fundamental policy of preserving the relationship between parents and children. In re Sumey, 94 Wn.2d 757, 761, 621 P.2d 108 (1980). "The legislature declares that the family unit is a fundamental resource of American life which should be nurtured." RCW 13.34.020. "It is 'no slight thing to deprive a parent of the care, custody, and society of a child.'" In re Welfare of C.B., 134 Wn. App. 942, 951, 143 P.3d 846 (2006) (quoting In re T.L.G., 126 Wn. App. 181, 198, 108 P.3d 156 (2005)).

Before a court may terminate parental rights, the state must prove the following six allegations by clear, cogent and convincing evidence:

(a) That the child has been found to be a dependent child;

(b) That the court has entered a dispositional order pursuant to RCW 13.34.130;

(c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;

(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. . . . ;

(f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1); RCW 13.34.190(1)(a).

Clear, cogent and convincing evidence "exists when the ultimate fact in issue is shown by the evidence to be 'highly probable.'" In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). Findings of fact in a termination case must be supported by evidence more substantial than in the ordinary civil case because of the state's burden of proving its case by "clear, cogent and convincing evidence." In re Hall, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983); In re Pawling, 101 Wn.2d 392, 399, 679 P. 2d 916 (1984).

1. The state failed to prove there was little likelihood conditions could be remedied so that M.G.M. could be returned to C.R. in the near future.

The state failed to present clear, cogent, and convincing evidence that there was little likelihood conditions could be remedied so M.G.M. could be returned to C.R. in the near future, as required under RCW 13.34.180(1)(e). What constitutes the near future is determined from the view point of the child, taking into consideration her age and the circumstances of her placement. C.B., 134 Wn. App. at 954. Before parental rights can be terminated, the state must prove it is highly probable that there is little likelihood parental deficiencies can be remedied within the child's near future. Id. at 959.

In C.B., the trial court terminated the mother's parental rights, finding that, while she had the ability to make the necessary changes, the time frame did not allow it. C.B., 134 Wn. App. at 953. On appeal, this Court found that the record supported the court's determination that six months to a year constituted the near future for those children. Id. at 954. The evidence did not show, however, that the mother would not remedy her parental deficiencies in that time. Without evidence showing how long it would take the mother to improve, the state failed to meet its burden to show that it was highly probable that there was little likelihood

that conditions would be remedied so that the children could be returned to the mother in the near future. Id. at 959.

In this case, the court's findings as to this statutory element are not supported by substantial evidence. As in C.B., the state here failed to prove by clear, cogent, and convincing evidence that M.G.M. could not be returned to C.R. in the near future.

First, the court found that C.R. had failed to comply with drug and alcohol treatment and stated it considered this lack of compliance significant to the termination decision. 4RP 385. The court found specifically that, "Of the forty-nine urinalysis tests [C.R.] was required to take, she took only thirty-nine. This is not substantial compliance." CP 12-13. The evidence showed, however, that C.R. completed 49 UAs, none of which was positive for illegal substances, and missed 10. See 2RP 134, 2RP 136, 3RP 312.

On direct examination, the state asked the social worker about the number of UAs C.R. missed and the number she completed:

> Q. How many UAs has she missed during the course of this dependency?
>
> A. During the course of this dependency, she missed ten UAs.
>
> Q. And to the best of your understanding, what's the total number of UAs that she's done or been asked to do during the course of this dependency?

A. I counted just this morning, and 49.

Q. So roughly 20 percent of the UAs that she's been asked to do, she's missed. Does that sound about right?

A. Sounds about right.

2RP 134-35. Because of the confusing question about how many UAs "she's done or been asked to do," it is not immediately clear whether C.R. had done 49 UAs and missed 10 others, or if she had been asked to do 49 and missed 10 of those. Further testimony from the social worker clarified this point, however.

When asked if she was concerned by C.R.'s testimony that she would not be able to do treatment in Tacoma because of transportation issues, the social worker responded, "Well, I know that she did do 49 UAs in Tacoma." 2RP 136. And on cross examination the social worker testified as follows:

Q. So you talked about how many UAs mom has done throughout the course and I think the number was 49; is that correct?

A. Approximately, yes.

Q. So have any of those been positive?

A. Not that there was any prescription for. I believe the first one she did was – she had a prescription for opiates at that time.

3RP 312. The evidence therefore does not support the court's finding, and that finding does not support the termination decision.

Next, the court concluded that there was little likelihood M.G.M. could be returned to C.R. in the near future, because C.R. did not make significant progress correcting her parental deficiencies during the dependency. CP 13. The court noted that C.R. had continued to live with M.M. until recently, even though he was not participating in services, and stated that, "Despite services to address this issue, [C.R.] failed to demonstrate an understanding of the impact of her poor choices in relationships on the safety and welfare of her child." CP 13. Expert testimony contradicts this finding, however.

C.R.'s psychotherapist, Roxanne Brown, testified that C.R. was referred to her to work on relationship issues, and she felt that C.R was definitely moving toward making wiser choices and healthier relationships. 3RP 213. During the course of her work with C.R., Brown found that C.R. showed insight into the fact that she had chosen to be with men in the past who were not good for her and she was realistically working toward breaking that pattern. 3RP 218-19. Brown concluded that C.R. had made appropriate progress in understanding and choosing healthy relationships for the amount of time she had been working with Brown. 3RP 234, 239.

While the social worker expressed some concern about C.R.'s current relationship with Wiley, the state failed to present any evidence

that this relationship was unhealthy or detrimental to C.R.'s ability to parent her daughter. 3RP 358. C.R. had told her counselor that Wiley was unlike the other men she had been involved with, because he was responsible and had no trouble with the law. 3RP 323. And C.R. testified that her relationship with Wiley was healthier than past relationships. 2RP 110. The state presented no evidence to contradict this testimony, and the court's finding that C.R. failed to make progress in this area is not supported by substantial evidence.

The state argued in closing that the foreseeable future for a child M.G.M.'s age is no more than a year. 3RP 356. In the five months that C.R. had been working with Brown, she had removed M.M. from her home, moved out of an unhealthy residence and into a home that was appropriate for M.G.M., obtained a job, and demonstrated increasing insight into the fact that her prior relationships were unhealthy. 2RP 76, 80-82, 89; 3RP 239-40, 348. There was no evidence that C.R. lacked or was unable to apply appropriate parenting skills, as the court found, and she testified that she was capable of parenting M.G.M. CP 14; 3RP 348. Visitation reports confirmed that C.R. was always appropriate with M.G.M. and she has a great bond with her daughter. Thus, the state failed to prove by clear, cogent, and convincing evidence that there was little

likelihood M.G.M. could be returned to C.R. in the near future, and the order of termination must be reversed.

2. The state failed to prove that continuation of the parent-child relationship diminished M.G.M.'s prospects for early integration into a stable and permanent home.

Before a court can order termination of parental rights, the state must prove "[t]hat continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." RCW 13.34.180(1)(f). This requirement demonstrates the Legislative acknowledgment that, even where there is little chance a parent will ever be able to resume custody of a child, it is still better to preserve the parent-child relationship so long as it does not actually interfere with the permanence and stability of the child's home. The finality of termination, with its potential for detrimental emotional and mental impact on the child, should be avoided if possible. See In re J.D., 42 Wn. App. 345, 350, 711 P.2d 368 (1985).

Under RCW 13.34.180(1)(f), the state must prove that an ongoing relationship between parent and child reduces the child's chances of integrating into a stable and permanent home. In re K.S.C., 137 Wn.2d 918, 937, 976 P.2d 113 (1999). As with the allegation in subsection (e), the court's finding as to this requirement is based on the unproven

assumption that C.R. could not resolve her parental deficiencies in the foreseeable future. CP 14. There was no evidence, however, to support a contention that continuing M.G.M.'s relationship with her mother interfered with her integration into a permanent home.

In fact, the evidence showed that M.G.M. is fully integrated into a stable and loving home. She has been living with her paternal aunt for a year and a half, in a safe and stable environment where M.G.M. is growing and learning, and M.G.M. is very happy and bonded with her aunt. 2RP 149; 3RP 208-08, 375. M.G.M.'s aunt loves her and is committed to her, and the plan if termination were granted was for M.G.M.'s aunt to adopt her. 3RP 209-10. Moreover, there was no indication that the family would not continue to be a placement resource for M.G.M. if the dependency continued for another six months to a year.

The social worker and CASA testified that M.G.M. could not be adopted if C.R.'s parental rights continued, and they gave their opinion that termination should be granted so that M.G.M. was legally free to be adopted. 3RP 209, 375. This testimony focused on the limitations of foster care in general. In evaluating this statutory allegation, however, the court must focus on whether the parent-child relationship interferes with integration, and not just what constitutes a permanent home. K.S.C., 137 Wn.2d at 927.

Naturally, children need permanence. But a foster home can constitute a stable and permanent home. See In re Siegfried, 42 Wn. App. 21, 28, 708 P.2d 402 (1985). When the parent-child relationship is not interfering with the child's integration in the foster home, the court may not order termination. In re Welfare of S.V.B., 75 Wn. App. 762, 775, 880 P.2d 80 (1994).

The current relative placement in this case has been identified as the M.G.M.'s permanent home, and the evidence shows she is integrated into that family. Immediate termination, rather than continuing the dependency a short time while C.R. resolved her legal situation, would not change M.G.M.'s placement or integration into that family. It would serve only to deprive M.G.M. of a positive and loving relationship with her mother, which she has enjoyed her entire life. 3RP 207; see S.V.B., 75 Wn. App. at 775 (continuation of parental rights did not interfere with oldest child's integration into permanent home with guardian; termination would merely deprive child of benefits a relationship with the father could provide). Because the state did not prove that continuing the parent-child relationship would interfere with M.G.M.'s integration into a stable and permanent home, the order of termination must be reversed.

D. CONCLUSION

The state failed to prove the statutory allegations by clear, cogent, and convincing evidence, and the order terminating C.R.'s parental rights must be reversed.

DATED this 21st day of April, 2008.

Respectfully submitted,

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APPENDIX